

CERTIFIED FOR PARTIAL PUBLICATION\*

**COPY**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHEN MICHAEL MONIZ,

Defendant and Appellant.

C048738

(Super. Ct. No.  
CRF036599)

APPEAL from a judgment of the Superior Court of Yolo County, Michael W. Sweet, J. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Carlos A. Martinez, Supervising Deputy Attorney General, and Mathew Chan, Deputy Attorney General, for Plaintiff and Respondent.

Late one night, Deputy Dan Skaggs pulled over a car driven by Danielle Giampappas for sporting expired tags. The deputy

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\* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I, II, and IV of the Discussion.

ordered Giampappas and her passenger, defendant Stephen Michael Moniz, out of the car. A search of the car, to which Giampappas consented, unearthed marijuana cigarettes, methamphetamine, and heroin.

A jury found defendant guilty of transporting heroin, transporting methamphetamine, possession of heroin, possession of methamphetamine, possession of drug paraphernalia, unauthorized possession of a hypodermic needle, and destroying or concealing evidence. (Health & Saf. Code, §§ 11352, subd. (a), 11379, subd. (a), 11350, subd. (a), 11377, subd. (a), 11364; Bus. & Prof. Code, § 4140; Pen. Code, § 135.)<sup>1</sup> Sentenced to seven years in state prison, defendant appeals, contending: (1) insufficient evidence supports his conviction for concealing evidence, (2) the court erred in instructing on concealing evidence, (3) ineffective assistance of counsel, (4) the court erred in finding his conviction for concealing evidence rendered him ineligible for Proposition 36 treatment, and (5) the court abused its discretion in denying his motion to dismiss under Penal Code section 1385. We shall affirm the judgment.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

An information charged defendant with seven counts: transporting heroin (count 1), transporting methamphetamine (count 2), possession of heroin (count 3), possession of methamphetamine (count 4), possession of drug paraphernalia

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

(count 5), unauthorized possession of a hypodermic needle (count 6), and destroying or concealing evidence (count 7). In addition, the information alleged defendant had served five prior separate prison terms, each within the meaning of section 667.5, subdivision (b).

A jury trial followed. The court granted defendant's motion to bifurcate trial on the prior prison term allegations.

Yolo County Sheriff's Deputy Dan Skaggs testified about the events the night of the search. Shortly after midnight on October 21, 2003, Skaggs made a traffic stop of a car with an expired vehicle registration tag. When Skaggs approached the vehicle, he saw Giampappas in the driver's seat and defendant in the passenger seat. Skaggs asked Giampappas for identification, which she began looking for in the car. After Giampappas failed to produce identification, Skaggs asked her to step out of the car.

Giampappas and Skaggs stood at the rear of the car, where defendant could not be seen, and spoke for a couple of minutes. After Giampappas gave her name, Skaggs asked defendant the driver's name for verification. Defendant identified Giampappas as Danielle Chappa.

Skaggs then asked defendant for identification. Defendant responded that he had a credit card with his name on it and got out his wallet. As defendant looked through his wallet, Skaggs saw a plastic bag fall from his hand onto the car floor. The bag contained what Skaggs believed to be two marijuana cigarettes. Skaggs opened the door and asked defendant to get

out of the car. As defendant got out, he used his foot to push the bag toward the seat. Skaggs handcuffed defendant and placed him in the patrol car.

After telling Giampappas about the marijuana, Skaggs obtained her permission to search the car. Skaggs placed Giampappas in the patrol car with defendant, leaving them alone for about 15 minutes. Skaggs's search of Giampappas's car revealed a crystalline-type substance spread on the passenger seat. Skaggs scooped up the substance into a plastic bag. Later tests showed the substance to weigh .21 gram and to contain methamphetamine. Skaggs testified that methamphetamine is generally transported in a container, not spread out on a seat.

Underneath the passenger seat, Skaggs found a glass smoking pipe similar to those used to smoke methamphetamine. Skaggs found a sunglasses case, an alcohol wipe, and a hypodermic syringe between the passenger seat and the center console. These items were not visible until Skaggs peeled back the edge of the seat.

The sunglasses case contained a piece of plastic with a hard brown substance inside. Subsequent tests established the substance to contain heroin weighing .38 gram. Skaggs found all the contraband around the passenger seat; he located no contraband around the driver's seat.

Skaggs asked Giampappas and defendant about the items; both denied any knowledge. Defendant told Skaggs he had not used illegal drugs for over a year and was currently participating in

a methadone program. Skaggs placed both Giampappas and defendant under arrest and told them they would be tested for drugs. At that point, Giampappas claimed the drugs were hers.

Later drug tests revealed the presence of methamphetamine in defendant's blood. The absence of amphetamine in defendant's blood indicated he had recently used methamphetamine.

Giampappas testified she and defendant, a friend of several years, were driving to a casino when Skaggs pulled them over. Giampappas had picked up the car earlier that day from the police impound, where it had been taken after her husband's arrest for a parole violation.

Defendant appeared somewhat stressed when they were stopped. When Giampappas gave Skaggs permission to search the car, she had no reason to believe he would find anything since she kept her car clean. She had no prior knowledge of anything illegal in the car.

Giampappas recognized the substance retrieved from the passenger seat as methamphetamine, since she had been a drug user for many years. However, Giampappas did not recognize the other substance as heroin, since she had never used heroin. Giampappas denied ownership of the smoking pipe, syringe, or sunglasses case.

After Skaggs handcuffed her, Giampappas told him the drugs he found were hers. Giampappas testified she lied because defendant told her he had money, and if she took the blame he would post her bail. Defendant said he could not go to jail because he had to go to the methadone clinic the following

morning. Defendant encouraged her to claim the drugs were hers, and told Giampappas he would drive her car home so it would not be impounded.

Giampappas followed defendant's advice because she did not want to go to jail. She was unaware both she and defendant could be arrested for the "same thing." Giampappas asked Skaggs to release defendant, thinking defendant would bail her out of jail.

Giampappas also testified she lied when she told Skaggs her husband had been arrested for having illegal drugs in his car. In hindsight, she termed the lie "silly." Giampappas stated she expected defendant to do the right thing: "I was expecting the person who had the drugs in my car to step up to the plate, that's what they do in my neighborhood." She also lied when she told Skaggs she had not used drugs for the past four years; in fact, she had used methamphetamine the day before her arrest.

Although Giampappas insisted she knew nothing about the drugs, she entered a plea to possession of methamphetamine in exchange for a dismissal of all other counts and no prison time. Her plea was not conditioned on testimony against defendant and she was not promised anything for her testimony.

Defendant testified in his own behalf. He admitted to prior felony convictions for burglary and theft. Defendant stated he had known Giampappas for about eight months before their arrest. Giampappas's boyfriend was on parole and the pair stayed with defendant. Giampappas's boyfriend had been arrested

for possession of narcotics, and her car was impounded two or three days before the traffic stop.

When Skaggs pulled the car over, defendant was dozing. Defendant asked Giampappas, who seemed nervous, what was going on. Giampappas told him she did not have a license.

Giampappas got out of the car, returning to look for her driver's license. Giampappas opened the console in the center of the front seat, threw something at defendant, and told him to put it in the seat. When Giampappas opened the console, defendant saw the eyeglasses case. Defendant noticed some cellophane on the jacket he held over his arm. The cellophane fell to the floor as he attempted to retrieve his credit card from his wallet.

Defendant denied telling Giampappas to lie about ownership of the drugs. Nor did defendant offer to bail her out. Defendant denied possessing the methamphetamine or heroin found in the car. Defendant testified he did not intend to conceal the marijuana as he got out of the car.

During cross-examination, defendant testified he never used methamphetamine but stated someone slipped methamphetamine in his coffee. Although defendant previously used heroin, he testified he no longer uses heroin. Defendant also testified he previously took methadone for his heroin addiction but is currently taking LAAM to treat the pain from his lung cancer. Defendant had tried to quit heroin on at least five occasions.

On rebuttal, Skaggs testified that after he asked Giampappas to get out of the car she never returned to the car.

The jury found defendant guilty on all counts. In the bifurcated trial before the court, the court found all prior prison term allegations true.

The trial court denied defendant's motion to strike his conviction on count 7, and found defendant ineligible for sentencing under Proposition 36. (§§ 1210, 1210.1.) The court sentenced defendant to seven years in state prison: the midterm of four years on count 1 plus three one-year prison term enhancements. The court imposed a concurrent three-year midterm on count 2 and stayed midterm sentences of two years each on counts 3 and 4 pursuant to section 654. The court struck the other two prison term enhancements. Defendant filed a timely notice of appeal.

## **DISCUSSION**

### **I. INSTRUCTIONAL ERROR**

Because it will help to frame the insufficiency of the evidence argument, we first consider defendant's contention that the court erred in failing to instruct the jury that count 7 (destroying or concealing evidence) could not be based on defendant's actions in regard to the marijuana found in the car. He argues that although the court gave a unanimity instruction in regard to count 7, the court neglected to instruct the jury that the offense could not be based on defendant's actions in regard to the marijuana.

#### **Background**

Defendant made a motion in limine for the court to exclude any evidence of the marijuana found in the car since the

prosecution was not proceeding on any charges related to the presence of marijuana. The prosecution argued Skaggs's discovery of the marijuana was relevant on the issues of why he removed defendant from the car and how he conducted the subsequent search. The prosecution stated count 7 was based on defendant's attempt to destroy the methamphetamine, not on the discovery of the marijuana. The court granted defendant's motion.

The court later revisited the issue and found the defense opened the door on the marijuana issue during Skaggs's cross-examination. The court reversed its ruling, and Skaggs testified regarding his discovery of the baggie containing marijuana cigarettes.

Defendant objected to any instruction on destroying or concealing evidence, arguing the evidence showed only an attempt to conceal evidence. In addition, defendant also reiterated the prosecution's initial offer of proof that count 7 was based on the scattering of methamphetamine on the seat. Defendant contended any other basis for count 7 would violate his right to due process. The prosecution responded that initially the parties discussed excluding the marijuana evidence, but subsequently the People had "enough evidence to argue to the jury concealment or the attempted concealment of any drug not marijuana."

The court noted the prosecution's theory on count 7 was not based on the marijuana, and the prosecution had elected prior to trial not to proceed on the marijuana as to count 7. The court

concluded: "[T]hat still stands. [¶] It seems to me for argument purposes based on the evidence that was presented there is a possible attempt to conceal methamphetamine, I suppose that's in the seat or the glass case that contained the heroin and the syringe that was located between the passenger seat and the console, so it seems to me you could argue either or both of those acts constituted a concealment or attempted concealment, and for that reason I will instruct on 17.01 that the jurors must be unanimous as to the act or acts involved."

The court subsequently instructed the jury: "The Defendant is accused in Count 7 as I indicated of concealing or destroying evidence. The prosecution has introduced evidence for the purpose of showing there is more than one act upon which a conviction for Count 7 may be based. The Defendant may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of the acts. However, in order to return a verdict of guilty as to Count 7, all jurors must agree that he committed this same act or acts. It is not necessary that the particular act or acts agreed upon be stated in your verdict."

### **Discussion**

Defendant claims the court erred by failing to give sua sponte an instruction precluding any consideration of defendant's attempt to conceal marijuana in the jury's

deliberation of the charge of destroying or concealing evidence. The People argue any error was harmless.<sup>2</sup> We agree.

During closing argument, the prosecution reminded the jury that it must unanimously agree on what defendant was attempting to conceal: either the methamphetamine or the heroin, or both. The prosecution emphasized the jury could not find defendant guilty of trying to conceal marijuana. However, the jury could consider defendant's actions regarding the marijuana as evidence of his specific intent to conceal the methamphetamine or heroin. Contrary to defendant's assertion on appeal that the prosecution's argument was a thinly veiled attempt to convince the jury to convict on count 7 based on the marijuana, the prosecution specifically and clearly stated the marijuana evidence could only show intent behind the concealment of the *other* drugs. Moreover, defendant did not object to the prosecution's argument, an argument that complied with the trial court's ruling on the issue.

Defense counsel, during closing argument, reiterated the prosecution's warning against using the marijuana evidence to convict on count 7. He argued that even if the other drugs belonged to defendant, the prosecution failed to show defendant concealed the drugs. Defense counsel pointed out defendant's

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<sup>2</sup> The People also contend that failing to request modification of the standard unanimity instruction waives the issue. However, in the alternative, defendant also claims defense counsel's failure to request such a modification constitutes ineffective assistance of counsel. Accordingly, regardless of waiver, we must confront the issue.

alleged concealment occurred before anyone was aware of any investigation for drugs. According to defense counsel, since defendant had no specific intent to conceal, he was not guilty of concealing or attempting to conceal evidence.

In rebuttal, the prosecution argued Giampappas was not charged with concealing evidence because defendant was alone in the car when the drugs were concealed. He argued defendant concealed methamphetamine and heroin, but again cautioned: "[Y]ou are not to consider whether he was attempting to conceal the marijuana as part of 135."

During deliberations, the jury sent the court a note asking whether defendant could be convicted of concealing drug paraphernalia. The court conferred with the parties and responded: "Ct 5 is possession of controlled substance paraphernalia[.] Ct 7 is concealing evidence which references either the methamphetamine or the heroin or both. But see Instruction 17.01[.]"

Defendant objects to the court's response, arguing the court failed to mention that it could not find defendant guilty on count 7 based on the marijuana concealment. However, as the People point out, the jury expressed no confusion as to which drugs would support a conviction for concealment.

Given the court's instruction, the prosecution's closing argument, and defense counsel's closing argument, we find any failure to modify the unanimity instruction as defendant suggests was harmless beyond a reasonable doubt. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 852-853.) Since we find any

instructional error was harmless beyond a reasonable doubt, we also conclude defendant could not have been prejudiced by counsel's shortcomings, if any. Therefore we reject defendant's claim of ineffective assistance.

## **II. SUFFICIENCY OF THE EVIDENCE**

Defendant contends insufficient evidence supports his conviction for destroying or concealing evidence under section 135. According to defendant, when Skaggs stopped the car, there was no pending trial or investigation, a necessary element of the offense.

In addressing a defendant's claim of insufficient evidence, we review the entire record to determine whether it discloses substantial evidence -- evidence that is reasonable, credible, and of solid value -- such that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Hughes* (2002) 27 Cal.4th 287, 357.) We review the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all reasonable inferences from the evidence to support the verdict. (*People v. Johnson* (1980) 26 Cal.3d 557, 575-578.) Before a judgment of conviction can be set aside for insufficiency of the evidence, it must clearly appear that on no hypothesis whatsoever is there sufficient evidence to support the judgment. (*Ibid.*; *People v. Redmond* (1969) 71 Cal.2d 745, 755.) The substantial evidence standard of review is the same when the evidence of guilt is primarily circumstantial. (*People v. Holt* (1997) 15 Cal.4th 619, 668.)

Section 135 provides: "Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor."

The court instructed the jurors that in order to find defendant guilty of destroying or concealing evidence in count 7, they must find the prosecution had proved each of the following elements: "No. 1, the Defendant willfully destroyed or concealed any matter or thing; No. 2, the matter or thing was about to be produced in to evidence upon any trial or investigation; No. 3, the Defendant did this action with a specific intent to prevent that matter or thing from being produced in to evidence upon any trial or investigation." The court further instructed the jury that if it was not satisfied beyond a reasonable doubt that defendant was guilty on count 7, it might nonetheless convict him of the lesser offense of attempted destruction or concealment of evidence.

Defendant argues there was no evidence that Skaggs was looking for any controlled substances, and thus the methamphetamine and heroin found during the subsequent search of the car cannot be considered to have been articles that defendant knew were about to be produced in evidence.

Skaggs stopped Giampappas's car because of expired registration tags. Skaggs asked her to step out of the car after she failed to produce identification. Giampappas and

Skaggs stood at the back of the car for several minutes, leaving defendant alone and out of sight in the car. Giampappas did not have a license, a circumstance that sparked further investigation by Skaggs, who stepped to the car and asked defendant to verify the driver's name. Defendant's response, identifying Giampappas by a different name, prompted the officer to ask defendant for identification. Not until defendant inadvertently dropped a baggie containing marijuana while attempting to retrieve his identification did the vehicle stop, which began as an inquiry into expired tags, morph into a drug investigation.

Skaggs testified defendant pushed the plastic bag toward the seat in an attempt to hide it. When defendant got out of the car, Skaggs found methamphetamine scattered over his seat. Perhaps the effort to conceal the plastic bag containing marijuana constituted a violation of section 135. However, as noted earlier, the prosecution repeatedly disavowed any reliance on the marijuana concealment as a basis for the charge. Thus, defendant's guilt must be premised on the concealment of the methamphetamine or the concealment of heroin and drug paraphernalia underneath and on the side of the passenger seat. Any such concealment would have taken place while the officer was investigating the expired tags and before the drug investigation had begun.

The purpose of section 135 is to prevent obstruction of justice. One can obstruct the administration of justice in varying degrees and in a variety of ways. The permanent

concealment of evidence is a substantial obstruction of justice. To a lesser degree, any act of concealment that interferes with, impedes, frustrates, or unnecessarily prolongs a lawful search constitutes an obstruction of justice. (*People v. Hill* (1997) 58 Cal.App.4th 1078, 1089-1090 (*Hill*).)

Section 135 applies during the course of a police investigation even though no formal legal proceedings are pending. (*Hill, supra*, 58 Cal.App.4th at pp. 1089-1090.) However, the statute requires that the defendant must have known the thing was "about to be produced in evidence upon any investigation whatever . . . ." A criminal perpetrator cannot be punished under section 135 for concealing evidence of the crime until: (1) an investigation is commenced, (2) the item concealed is about to be discovered, and (3) the perpetrator has knowledge of (1) and (2).

In *People v. Prysock* (1982) 127 Cal.App.3d 972 (*Prysock*), the prosecution failed because no investigation was underway when the items of evidence were concealed. In *Prysock*, the defendant, shortly after the crime's commission, burned clothing worn at the time of a murder. The defendant argued that insufficient evidence supported his conviction under section 135 because the items were not about to be produced. (*Prysock*, at p. 998.) The court agreed, reasoning: "The statute requires that the actor know that the object is *about to be produced* in evidence. We conclude that whatever the statute's exact meaning, the evidence herein falls short because the prosecution failed to show that any law enforcement investigation in fact

had started and/or that law enforcement was or would be looking for the particular item. Unless this or a similar limiting interpretation is given, the statute would appear virtually open ended, at least in all but 'victimless' crimes." (*Id.* at p. 1001.)

The facts of our case are different. It is the Attorney General's theory that defendant was aware Giampappas did not have a driver's license and therefore believed Deputy Skaggs would investigate further and uncover information that would result in a search. He thereupon spread the methamphetamine over the seat with the hope that it would escape attention and hid the heroin in a sunglass case between his seat and the center console.

The evidence supports this theory. Indeed, (1) an investigation had commenced, (2) given that neither the driver of the vehicle nor defendant possessed a driver's license, the investigation was likely to expand to include a view of the car's interior and the drugs located there, and (3) defendant knew of (1) and (2).

It is of no legal significance that the investigation was of a traffic offense and had not focused on defendant or drugs. The statute refers to "any . . . investigation whatever" and is not limited to investigations targeting the defendant or contraband of a particular type or description. It is sufficient that defendant knew of a law enforcement investigation that would likely result in the discovery of the drugs in the car. We therefore reject defendant's argument that

there was no pending action against him or pending investigation for controlled substances.

Defendant also argues, based on the reasoning of *Hill*, *supra*, 58 Cal.App.4th at p. 1090, that even assuming the evidence was sufficient to support a finding that he placed the evidence out of view, his actions did not appreciably affect the investigation. Defendant misinterprets *Hill*. In *Hill*, the defendant, riding in a car with police following, tore up forged traveler's checks and tossed them out the window. Officers recovered the checks, which were reassembled and used as evidence at trial. (*Hill*, *supra*, 58 Cal.App.4th at pp. 1087-1090.) The appellate court concluded there was insufficient evidence to support the defendant's conviction on the theory he concealed the checks because the police observed his every move. "In full view of the police, defendant abandoned the torn checks by throwing them from the car. Clearly, he did not succeed in hiding or covering this evidence . . . ." (*Id.* at p. 1091.) Unlike the defendant in *Hill*, defendant here succeeded in concealing the drugs, at least for a moment, although as in every successful investigation the drugs were later uncovered.<sup>3</sup> No more was necessary.

### **III. PROPOSITION 36 TREATMENT**

Defendant argues the trial court erred in ruling his conviction for concealment of evidence was a misdemeanor not

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<sup>3</sup> Even though, in a sense, the methamphetamine was concealed in plain view.

related to the use of drugs within the meaning of section 1210, subdivision (d), making defendant ineligible for Proposition 36 treatment. Defendant contends his conviction for concealing evidence is a misdemeanor related to the use of drugs, qualifying him for Proposition 36 treatment.

Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, “requires the court to grant probation and drug treatment to any defendant convicted of a nonviolent drug possession offense and prohibits incarceration as a condition of probation. [Citation.]’ [Citation.] It is ‘an alternative sentencing scheme for those convicted of certain narcotics offenses. In effect, it acts as an exception to the punishment specified in an individual narcotics offense.’” (*People v. Wheeler* (2005) 127 Cal.App.4th 873, 877 (*Wheeler*)).

Section 1210.1, subdivision (b)(2) provides that a defendant is ineligible for probation and diversion if he or she has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony. (*People v. Canty* (2004) 32 Cal.4th 1266, 1272-1273 (*Canty*)). An offense is defined as one “not related to the use of drugs” if it does not involve the defendant’s simple possession or use of drugs or drug paraphernalia, presence where drugs are being used, or failure to register as a drug offender, or any similar activity. (*Ibid.*)

The trial court denied defendant’s request for Proposition 36 treatment: “Let me conclude that in reviewing the Canty case . . . it does not appear that concealment of

evidence would be such as to enable Mr. Moniz to qualify for the treatment under 1210.1, that it is not related to the use of drugs within the meaning of 1210(d), it is an activity dissimilar because it is an obstruction of justice. And because he otherwise would qualify except for Count 7, but Count 7 is the disqualifier, I will find him not qualified for Proposition 36 treatment on that basis."

Both parties, and the trial court, rely on *Canty* to bolster their differing interpretations of section 1210.1. Therefore, we review *Canty* in some detail.

In *Canty*, the court considered whether a defendant convicted of transporting methamphetamine, a felony, and driving a vehicle while under the influence of a controlled substance, a misdemeanor, has been "'convicted in the same proceeding of a misdemeanor not related to the use of drugs.'" (*Canty, supra*, 32 Cal.4th at p. 1273.) The court concluded a conviction for driving under the influence constituted a misdemeanor not related to drugs, and did not qualify the defendant for probation and treatment under Proposition 36. (*Ibid.*)

In reaching this conclusion, the Supreme Court engaged in a tripartite statutory analysis. First, the court noted that to be found guilty of driving under the influence of drugs in violation of Vehicle Code section 23152, subdivision (a), the defendant must have been appreciably impaired so that the defendant's ability to operate a vehicle was impacted. This differs from merely being under the influence of drugs. (*Canty, supra*, 32 Cal.4th at pp. 1278-1279.)

Second, the court observed that the conduct that is the central focus of simple possession and similar drug charges is the individual offender's own involvement with the prohibited substance. In contrast, the central focus in a driving under the influence charge is the individual's use of a vehicle. The court noted: "The gravamen of driving while under the influence is *driving* despite an impairment of capacity. [Citations.] That offense concerns the driver's activity as it actually or potentially affects or 'transacts' with other persons. In this respect, it is more similar to the 'commercial' drug offenses that expressly disqualify a defendant from receiving diversion." (*Canty, supra*, 32 Cal.4th at p. 1279.)

Third, the court concluded that drug and driving under the influence statutes protect different societal interests. The purpose of statutes proscribing being under the influence is to protect the user from the consequences of his or her own conduct. The purpose of statutes proscribing driving under the influence is to protect the public and guard against injury to others. (*Canty, supra*, 32 Cal.4th at p. 1279.)

The court also determined the intent behind Proposition 36 was to modify penalties for simple drug possession and not to change other criminal laws. (*Canty, supra*, 32 Cal.4th at pp. 1281-1282.) The court noted that if it were to interpret section 1210.1, subdivision (b)(2) not to preclude a defendant convicted of driving under the influence of drugs from receiving probation and treatment, the result would be inconsistent with the Vehicle Code's design to punish impaired drivers

identically, whether driving under the influence of drugs or alcohol. (*Canty*, at pp. 1281-1283.)

Defendant argues his situation differs from that of the defendant in *Canty*, since a conviction for concealing drugs differs significantly from the offense of driving under the influence of drugs or alcohol. To support this claim, defendant recreates the tripartite *Canty* analysis. First, defendant points out, concealing drugs does not involve impairment; instead, it is based on a defendant's possession of drugs. However, as the People note, what is relevant is that possession of drugs does not go hand in hand with destroying or concealing evidence. A defendant can possess drugs without violating section 135.

Second, defendant argues that while concealing drugs may require one step beyond mere possession, both offenses focus on the possession by the defendant and do not involve any type of commercial transaction or interaction with the public. However, section 135 is not directed toward drugs. Section 135 proscribes the destruction or concealment of any evidence, which may happen to be drugs. The central focus of section 135 is destruction of evidence, not possession of drugs.

Third, defendant argues, like mere possession of a drug and unlike driving under the influence, "there is no inherent risk to the public by the concealment of drugs from a law enforcement officer." However, as the People point out, the interest protected under section 135 differs from the interests protected by proscribing possession of drugs. The purpose of section 135

is to prevent the obstruction of justice. Through section 135, society seeks to prevent impediments to investigations and trials, and thus to preserve law enforcement and judicial resources.

After considering the factors examined in *Canty*, we agree with the trial court's determination that concealing or destroying evidence is not a misdemeanor related to drugs.

Our decision is bolstered by other recent cases finding that a variety of misdemeanors render a defendant ineligible for Proposition 36 treatment. In *Wheeler, supra*, 127 Cal.App.4th at p. 881, the court found forgery of a medical prescription, even when intended to obtain drugs for personal use, does not come within the term "'nonviolent drug possession offense.'" (See also *People v. Foreman* (2005) 126 Cal.App.4th 338, 343.) Another court found the term "nonviolent drug possession offense" excludes the crime of possession of a controlled substance while in immediate personal possession of a firearm. (*In re Ogea* (2004) 121 Cal.App.4th 974, 985-987.) The logic applied in these cases applies with equal force to the offense of concealing or destroying evidence.

#### **IV. DISMISSAL UNDER SECTION 1385**

Finally, defendant labels the trial court's refusal to dismiss count 7 an abuse of discretion. He contends the trial court failed to consider all relevant sentencing factors in declining to dismiss count 7. We disagree.

A trial court possesses broad power to dismiss an action under section 1385. This power must be exercised in the

furtherance of justice. Section 1385 requires the court to consider both the constitutional rights of the defendant and the interests of society in determining whether there should be a dismissal. At the very least, the reason for dismissal must be that which would motivate a reasonable judge. In exercising its discretion under section 1385, the court should consider the nature and circumstances of the defendant's current crimes, the defendant's prior convictions, and the particulars of defendant's background, character, and prospects. (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 98-99.)

We review a denial of a motion to dismiss under the deferential abuse of discretion standard. "It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

Our review of the record reveals the trial court performed its duties admirably. The court agonized over the decision, soliciting comments from both defense counsel and the prosecution at two separate hearings. After extensive discussion, the court denied the motion to dismiss count 7.

In denying the motion, the court reiterated its duty to consider both the rights of defendant and the interests of society. The court also noted the dismissal must be such as

would motivate a reasonable judge. In addition, the court considered defendant's lengthy criminal history, involving more than just drug-related convictions. The court also noted defendant made conflicting statements about the nature and extent of his drug use to a probation officer, and his statements at trial that the drugs found were not his. Finally, the court expressed its belief that defendant had very poor prospects for success in a drug treatment program based on his failure to make it to court on time during the jury trial.

We find no abuse of discretion.

**DISPOSITION**

The judgment is affirmed.

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RAYE, J.

We concur:

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SIMS, Acting P.J.

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NICHOLSON, J.